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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOSEPH E. VOGLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

and

NORTHERN ALASKA ENVIRONMENTAL CENTER;
SIERRA CLUB, ALASKA CHAPTER;
THE WILDERNESS SOCIETY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Should *Kleppe v. New Mexico*, giving plenary power to the Government over land with a state, be overruled?

2. Does the Park Service have regulatory power under the National Park Service Organic Act, 16 U.S.C. Section 1-3, to deny Park Inholders access in an ANILCA Park where ANILCA, a later, specific act, prohibits Park Service regulation of an Inholder's land?

3. Did the United States retain any measure of sovereignty over unappropriated federal lands in Alaska, in view of Alaska's unusual pre-statehood status of a non-self governing territory under Article 73 of the United Nations Charter and General Assembly resolutions implementing it?

LIST OF THE PARTIES

The caption contains all parties to the lower, Ninth Circuit Court.

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JOSEPH E. VOGLER,

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NORTHERN ALASKA ENVIRONMENTAL CENTER;
SIERRA CLUB, ALASKA CHAPTER;
THE WILDERNESS SOCIETY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Joseph E. Vogler, hereby petitions the United States Supreme Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit issued September 28, 1988, in *United States of America v. Joseph E. Vogler v. Northern Alaska Environmental Center et al.*, —— F.2d ——, Opinion No. 87-3798 (Appendix A).

OPINIONS BELOW

The decision appealed from is *United States of America v. Joseph E. Vogler v. Northern Alaska Environmental Center*, —— F.2d —— (9th Cir. Op. filed September 28, 1988, Memorandum filed July 19, 1988).

The decision of the trial court is from the U.S. District Court, District of Alaska, James Fitzgerald, J. and is contained in its *Pretrial Transcript: Memorandum and Order* filed January 5, 1987 and its *Partial Final Judgment* filed March 31, 1987. The Ninth Circuit decision incorrectly states it is an appeal from a decision by Judge Edward Leavy.

JURISDICTION

(i) Nature of the proceeding: this is a petition for a writ of certiorari from a final decision by the Ninth Circuit Court of Appeals in a civil case. The judgment sought to be reviewed is the *Memorandum* filed July 29, 1988, followed by a published *Opinion* filed September 28, 1988.

(ii) No rehearing was requested; no extensions of time within which to petition for certiorari were requested or granted.

(iii) The statute on which Supreme Court jurisdiction is based is 28 U.S.C. Section 1254(1). This petition is timely as filed within 90 days of the decision sought to be reviewed as required by 28 U.S.C. Section 2101(c).

STATUTES INVOLVED

Article IV, Section 3, Clause 2

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

16 U.S.C. sec. 1(c). General administration provisions; system defined; particular area

(a) . . . .

(b) Specific provisions applicable to area; uniform application of section 1b to 1d and other provisions of this title to all areas when not in conflict with specific provisions; references in other provisions to national parks, monuments, recreation areas, historic monuments, or parkways not a limitation of such other provisions to those areas

Each area within the national park system shall be administered in accordance with the provisions of any statute made specifically applicable to that area. In addition, the provisions of sections 1b to 1d of this title, and the various authorities relating to the administration and protection of areas under the administration of the Secretary of Interior through the National Park Service . . . shall to the extent such provisions are not in conflict with any such specific provision, be applicable to all areas within the national park system and any reference in such Act to national parks, monuments, recreation areas, historic monuments, or parkways shall hereinafter not be construed as limiting such Acts to those areas.

16 U.S.C. sec. 410hh. Establishment of new areas

The following areas are hereby established as units of the National Park System and shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act:

. . . .

(10) Yukon-Charley Rivers National Preserve, containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH-90,008, and dated October 1978. The preserve shall be managed for the following purposes, among others: To maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, in

its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of fish and wildlife, including but not limited to the peregrine falcons and other raptorial birds, caribou, moose, Dall sheep, grizzly bears, and wolves; and in a manner consistent with the foregoing, to protect and interpret historical sites and events paleontological history and cultural prehistory of the area. Except at such times when and locations where to do so would be inconsistent with the purposes of the preserves, the Secretary shall permit aircraft to continue to land at sites in the Upper Charley River watershed.

16 U.S.C. sec. 3103(c)

Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. *No lands conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations* applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly. [Emphasis added.]

16 U.S.C. sec. 3169. Valid existing right of access

Nothing in this subchapter shall be construed to adversely affect any valid existing right of access.

16 U.S.C. sec. 3170(b). Right of access to State or private owner or occupier

Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy is within or is effectively surrounded by one or more conservation system units, national recrea-

tion areas, national conservation areas or those public lands designated as wilderness study, the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assume adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

28 U.S.C. sec. 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . . .

28 U.S.C. 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

28 U.S.C. sec. 2101(c)

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

43 U.S.C. sec. 932

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

43 U.S.C. sec. 1769. Existing right-of-way or right-of-use unaffected; exception; rights-of-way for railroad and appurtenant communication facilities; applicability of existing terms and conditions

(a) Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this subchapter.

C.F.R. 36.10(e)(1)

. . . .

(e)(1) For any applicant who meets the criteria of paragraph (b) of this section, the appropriate Federal agency shall specify in a right-of-way permit the route(s) and method(s) of access across the area(s) desired by the applicant, unless it is determined that:

(i) The route or method of access would cause significant adverse impacts on natural or other values of the area and adequate and feasible access otherwise exists; or

(ii) The route or method of access would jeopardize public health and safety and adequate and feasible access otherwise exists; or

(iii) The route or method is inconsistent with the management plan(s) for the area or purposes for which the area was established and adequate and feasible access otherwise exists; or

(iv) The method is unnecessary to accomplish the applicant's land use objective.

CHAPTER XI

DECLARATION OF NON-SELF-GOVERNING TERRITORIES

ARTICLE 73

Members of United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, *economic*, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. *to promote constructive measures of development*, to encourage, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, *economic*, and scientific purposes set forth in this Article and;

e. *to transmit regularly to the Secretary General* for information purposes, subject to such limitation as security and constitutional considerations may require, statis-

tical and other *information of a technical nature relating to economic, social,* and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply. [Emphasis added.]

General Assembly Resolution 1314, 12 December 1958

Noting that the right of peoples and nations to self-determination as affirmed in the two draft Covenants completed by the Commission on Human Rights includes "permanent sovereignty over their natural wealth and resources",

Believing it necessary to have full information at its disposal regarding the actual extent and character of this sovereignty,

1. Decides to establish a Commission composed of Afghanistan, Chile, Guatemala, the Netherlands, the Philippines, Sweden, the Union of Soviet Socialist Republics, the United Arab Republic and the United States of America to conduct a full survey of the status of this basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and further decided that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard shall be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of under-developed countries; . . . . 12 December 1958.

STATEMENT OF THE CASE

Jurisdiction

The basis for initial federal jurisdiction is 28 U.S.C. Section 1345—United States as Plaintiff.

Facts

Vogler was traveling across the Bielenberg trail in interior Alaska enroute to his patented and unpatented claims on July 11, 1984. The Bielenberg trial was found by the District Court to be an R.S. 2477 trail leading from the town of Circle Hot Springs to Eagle, Alaska. The claims were located within the Yukon-Charley Rivers Preserve near where the trail passes Woodchopper creek. The Preserve was created by the Alaska National Interest Lands Conservation Act, (ANILCA) 16 U.S.C. Section 410hh(10), and is part of the National Park System.

As Vogler approached the Preserve where the Bielenberg trail enters it, he was served with a temporary restraining order. ANILCA describes a miner whose claims are surrounded by an ANILCA park or preserve as an "inholder" and requires him to get a permit before he can access his claims, whether by a route used before ANILCA or another.

The access Vogler was using when enjoined was proven to have been an established R.S. 2477 (43 U.S.C. Section 932) trail, but the District Court and Ninth Circuit held that Vogler's, or any inholder's, right to use such a trail was subject to reasonable regulation and the complete denial of access when the trail was not frozen was a valid restriction. Vogler was using the trail when the trail was not frozen—in July. The record before the Ninth Circuit contains the Government's admission that an access permit would be granted only in winter. Vogler was using it and stated that in the future he wanted to use it primarily in summer.

Vogler traveled the trail with a bulldozer and a truck with very large tires, designed for off road use. In doing so, he knocked down brush and small trees and moved some dirt and gravel to fill in low spots and to facilitate stream crossings. The trail had been used for over 50 years, but had not been used recently, so the amount of

trees and brush he damaged or cleared was greater than it would otherwise have been. Vogler said he "raised cain" with the trail.

The Government said, and Vogler agrees, it would cost a lot to plant new trees and brush and otherwise return the trail to the condition it was in before his trip, but the Government's assertion of this damage was made prior to the District Court's ruling that the trail was an established public easement.

Vogler was taking the truck, loaded with supplies, and the bulldozer to his mining claims in the Preserve in order to mine them. Had he reached them, he would not have been able to mine legally, according to the lower courts, without a permit, also from the Park Service. To get one would require submission of a Mining Plan of Operations. The permit application would have required him to promise to take certain reclamation steps, e.g. resurfacing, refoliation, removal of buildings. The cost of this work would have rendered it impossible to mine at a profit so for this reason, plus his belief that the permit regulations did not apply to inholders, he did not apply for a permit.

More than two years after this case was filed, the Park Service modified their access regulations, 43 CFR 36.10(e), to provide that if no feasible—to the inholder—alternative to the access requested by the inholder can be granted, the Park Service will grant the access requested, unless "the method is unnecessary to accomplish the applicant's land use objective." 43 CFR 36.10(e)(1)(iv). The Park Service contended it makes this determination as it submitted an affidavit of a government employee to dispute Vogler's, saying Vogler has feasible alternative access in that he could take a boat up the Yukon River (District Court CR/ER 43, at 49-52). This affidavit disputed Vogler's affidavit on the same issue, that river travel was dangerous and not feasible. This dispute was not resolved in ruling on the summary judgment.

Applying for an access permit under either of the old or new regulations would have been futile because, without permission to mine, access to the mine was of no use. So the bulldozer sits where it was when the TRO was served in 1984.

REASONS FOR ACCEPTING THE PETITION

Vogler wants this court to overrule *Kleppe v. New Mexico*, 426 U.S. 529 (1976), and return to the rule that the Article IV, Section 3 property power enables the Government to do those things "necessary and proper" to protect its interests as a property owner. *Camfield v. United States*, 167 U.S. 518 (1987); *Hunt v. United States*, 278 U.S. 96 (1928). This proprietary power was described as akin to a private owner's rights to protect its property. The fact that the Government, of necessity, acts through legislation is not an indication that it possesses a constitutional power to do so. The Government will not lack for any power to hold, use or manage federal land where necessary and proper to any of its enumerated powers' purposes.

Land not needed for a present or anticipated enumerated power use (i.e., unappropriated land) should be disposed of pursuant to the Article IV, Section 3 power to make needful regulations for the disposal of the surplus lands. *Pollard's Lessee v. Hagan*, 44 U.S. 212, 11 L.Ed. 565 (1845).[1] The disposal rules and regulations envisioned could provide an orderly disposal plan. This would also provide the federal government with substantial revenue, perhaps to apply to the national debt; it would give state and local governments a greater tax base and so allow the Western states to achieve their equal footing. But the greatest benefit would be to re-

[1] "The right of Alabama and every other new state to exercise all the powers of government which belong to and may be exercised by the original states of the union must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands." *Pollard's Lessee*, 44 U.S. 212, 224.

instate the division of powers and property control intended as our Constitutional system of federalism.

The Constitutional Drafters never intended the level of federal land ownership prevalent in the Western states nor the resultant imbalance in equal footing among the states. *Pollard's Lessee v. Hagan*, supra; note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 Colum. L. Rev. 817 (1980).

Extensive federal ownership of land in the Western states may impinge upon the sovereignty of those states to an extent that destroys the equal footing doctrine. See generally Hanna, *Equal Footing in the Admission of States*, 3 Baylor L. Rev. 519 (1951).

Overruling *Kleppe* would allow the return of the Tenth Amendment to its rightful place in apportioning governmental power, which it held until *Garcia v. San Antonio Metro*, 409 U.S. 528, 83 L.Ed.2d 1016 (1985), eliminated it—by a 5-4 vote. It would also eliminate the potentially embarrassing conflict between the federal government's view of its obligations to its colonies, as shown in U.N. resolutions and policies and the way the federal government treats Alaska. Granting the Petition in this case would give the Court a means of returning a substantial measure of federal power to the states.

I. THE FEDERAL GOVERNMENT, EXCEPT FOR *KLEPPE v. NEW MEXICO*, HAS NEVER HAD POWER TO RETAIN AND USE LAND WITHIN A STATE FOR OTHER THAN AN ENUMERATED POWERS PURPOSE

The Government's statutory power to regulate Vogler's use of his mining claims is the Mining in the Parks Act, which requires a park inholder to submit a mining plan of operation and mine only under the conditions imposed in the permit. Vogler did not apply because he and three other experts in Alaska placer mining and familiar with his operation testified by affidavit that he would lose

money if he attempted to mine under the conditions required by regulations to be imposed in the permit. The mining plan of operations was to be a detailed proposal of how he proposed to mine, including promises to do a variety of costly things that he could not in good faith promise.

The Government's statutory power to regulate Vogler's access to and use of these mining claims was found by the lower courts from the general regulatory power granted in the National Park Service Organic Act, 16 U.S.C. Section 1, 2, and 3. ANILCA provisions which specifically addressed inholder access were not addressed by the lower court, though briefed by Vogler. These are ANILCA Section 103(c), (16 U.S.C. 3103(c)) which states that a Park inholder's access will be preserved, Sec. 1110(b), [16 U.S.C. sec. 3170(b)] which requires the Secretary to assure "adequate and feasible access for economic and other purposes," and Sec. 1109, (16 U.S.C. sec. 3169) which says this ANILCA subchapter does not affect any valid existing right of access.

The lower courts did not rely on either of these in deciding that the Park Service could deny him access if his route and travel method damaged the trees and brush. Since the trail was somewhat overgrown from disuse, Vogler's use of it would damage some of the growth. The lower court also did not address 16 U.S.C. Sec. 1c(b), which makes a more specific Park statute (ANILCA) applicable in that area over the (general) Park Service Organic Act.

Both ANILCA and the Mining in the Parks Act are based on the Government's assumed power to own and operate national parks on land within a state. The Government has not contended that this land is held for any other enumerated, federal power purpose.

The Government's authority to hold and operate these parks is Art. IV, Sec. 3, cl. 2 of the U.S. Constitution as

applied in *Kleppe v. New Mexico*, 426 U.S. 529, 49 L.Ed. 2d 34 (1976). This clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, Sec. 3, cl. 2.

Prior to *Kleppe*, no Supreme Court case had held that the federal property power allowed the United States to hold and use land within a state for other than an enumerated powers purpose. *Wilson v. Cook*, 327 U.S. 474, 90 L.Ed. 793 (1946); *Colorado v. Toll*, 268 U.S. 228, 69 L.Ed. 927 (1929); Engdahl, *State and Federal Power Over Federal Property*, 18 Ariz. L.Rev. 283, 349-355 (1976).

Law Review Articles which have criticized *Kleppe* as unique and incorrect in reasoning, though not in result are: Engdahl, *State and Federal Power over Federal Property*, 18 Ariz. L. Rev. 283 (1976); Engdahl, *Some Observations on State and Federal Control of National Resources*, 15 Hous. L. Rev. 1201 (1978); Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 Colum. L. Rev. 817 (1980); Gaetke, *Congressional Discretion Under the Property Clause*, 33 Hastings L. J. 381 (1981-82); 31 *Proceedings of the Rocky Mountain Mineral Law Institute* 1-1 at 1-15 to 1-18.

An important analysis of the scope of the Article IV property power is in *Dred Scott v. Sanford*, 60 U.S. 393, 15 L.Ed 691, 712-720 (1856), where, in a thorough analysis of its history and purpose, a majority of the court agreed that it gave the federal government no legislative power over property west of the Mississippi River. Unfortunately this reasoning and holding were lost about the turn of the century. By 1907 the court held in *Kansas v. Colorado*, 206 U.S. 46, 51 L.Ed. 956 (1907), that Article IV, Sec. 3 gave no power to legislate on how to reclaim arid lands in Kansas and Colorado,

but it cited *Dred Scott* for a different proposition, without mentioning its Article IV, Section 3 analysis.

The Solicitor's brief in *Kleppe v. New Mexico*, by Robert Bork, cited what purports to be a definitive paper on the federal property power: *Jurisdiction Over Federal Areas Within the States*, Report of the Interdepartmental Committee For The Study of Jurisdiction Over Federal Area Within The States, Part II (1957), (combined Project of Department of Interior, Dept. of Justice and other executive department agencies.)[2] This report did not cite or discuss the Article IV, Section 3 portion of the *Dred Scott* case. The Report stated, p. 64, that the courts have not had occasion to rule on the question of whether the Federal Government may retain partial or concurrent jurisdiction over an area within the exterior boundaries of a new State.

In twelve Western states the federal government owns from 29% (Washington) to over 80% (Alaska and Nevada) of the land. Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 Colum. L. Rev. 817-819 (1980). This author wrote that increased national concern over environmental and energy issues caused Congress to assert greater authority over federal property in the last decade or so. If these concerns are truly the cause, there is ample authority in the enumerated and "necessary and proper" powers, but if not, where federal power ends federal legislation should also, with the states allowed to take over.

The Government suggested in its Ninth Circuit brief p. 23, n. 14, that the power to establish the ANILCA Parks could be sustained, if necessary, under the commerce power. Vogler has no opinion on this as it was not the issue on which the case was decided.

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[2] A copy of this report of some 350 pages is lodged with the Supreme Court Clerk for review.

II. ANILCA WAS PASSED WITH A PROVISION INTENDED TO ASSURE, IN THE STRONGEST POSSIBLE LANGUAGE, THAT THE POWER TO REGULATE ACTIVITIES IN THESE PARKS AND PRESERVES PRECLUDED POWER TO REGULATE AN INHOLDER'S ACCESS TO OR USE OF HIS PROPERTY

Section 103(c) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3103(c), provides:

> (c) No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to the public lands within such units.

Section 1110(b) of ANILCA, 16 U.S.C. 3170(b), requires that owners of patented or unpatented mining claims:

> shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land [inholders'] by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

Section 103(c) was discussed and passed after 1110(b) so the specific legislative purpose to guarantee an inholder's access and use should control over any provision which seems contrary. Since the power to deny an access permit wherever its exercise would damage natural values of the land would contradict the unusually clear statements of the congressional intent, the "subject to reasonable regulations" sentence must not include the power to condition or deny access and use to an inholder. Without the assurance from ANILCA's proponents that they intended for inholders' access and use to be assured and guaranteed, the Bill would probably not have passed.

The Government's position on inholder access and use makes Senator Gravel's prediction—that the Park Administrators will later disavow their assurances—seem prophetic.

The District Court found the Bielenberg trail had been an established public right of way as of 1976 when R.S. 2477 (43 U.S.C. Section 932) was repealed by Sec. 706 (a) of FLPMA, 43 U.S.C. 1769(a). The declared purpose of FLPMA was that "the public lands be retained in Federal ownership." The Western states have joined to oppose this policy and have urged Congress to transfer the unappropriated lands to them.[3]

The trail was on federal land subject to an easement for public use. The easement was the result of acceptance, by public user, of the R.S. 2477 grant, so the easement had been conveyed out of federal ownership, consequently, it was not "public lands" to which the regulatory power applied, according to Sec. 103(c). The Government argued in the Circuit Court that since the underlying fee was still owned by the Government, the land had not been conveyed, so was subject to Park Service regulation.

In the following passages from the Congressional debates, show that both proponents and opponents of ANILCA believed inholder access and use rights existed in current law and would not be regulated away by Park Service regulations.

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[3] See "Western Delegates Seek State Control of Lands," N.Y. Times, Sept. 8, 1979 at 10, col. 6; "Angry West v. The Rest," Newsweek, Sep. 17, 1979; "Decolonizing the West," Wall St. J., Oct. 15, 1979, at 24 col. 1 (editorial) ("With such high proportions of their lands in [the federal government's] hands, people in the West wonder if they are states at all."

Speaker/Cite	*Summary or Quote*
126 Cong. Rec. S 15129-30 (1980).	Legislative history concerning access rights of Inholders
126 Cong. Rec. S 9424-6 (1980) Sen. Tsongas	"The valid existing rights of miners within park units are recognized. Their right of access is guaranteed by section 1110 of the committee bill. Let me read that again. The valid existing rights of miners within park units are recognized and their right of access is guaranteed by section 1110 of the committee bill."
126 Cong. Rec. S 11062 (1980) Sen. Gravel	"I know that many accept the words of the managers of the bill and the proponents of the bill saying yea there is access. But *I think time will bear out that that access is not worth the paper that it is written on and that the rights and the sovereignty of the State of Alaska and the people of Alaska will have been breached on this day and on tomorrow.*"
126 Cong. Rec. S 11062 (1980) Sen. Tsongas	"Mr. President, let me say, although this may be cold comfort, I am willing to work with the Senator from Alaska to put together language in a report that would make it clear to any bureaucracy, judiciary, administrative, whatever, that the access provisions provided in the bill were put in there seriously, that it is the intent of all parties concerned that they should be lived up to."

H. Con. Rec. 452, 96th Cong., 2d Sess., 126 Cong. Rec. H 1111-15 (1980) Rep. Udall	Introduces H. Con. Res. 452 with 103(c).
126 Cong. Rec. H 10529-30 (1980) Rep. AuCoin	"Also, [H.R. 39] assures owners of Inholdings reliable access across conservation system units in Alaska. The bill we are to approve today grants private inholder *carte blanche* access across national forest and public lands nationwide."
125 Cong. Rec. H 3133-4, 3159 (1979)	Rep. Udall's amendment states in Sec. 909 that inholders access rights are to be protected.
125 Cong. Rec. H 3240	Rep. Seiberling: The Udall-Anderson Bill does not alter in any way the ability of the State or Natives to do what it will with those lands (their inholdings). *"To the extent that access is required to get to lands if they are surrounded by such conservation units, we guarantee the owners' ability to have access to those lands. . ."* . . . . "All this amendment does is restate and make clear beyond any doubt that any state, Native or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands which in fact, are part of the unit. Rep. Young asks Selberling whether private land inholder will have the right to build a road.

	Seiberling responds: *"It does grant them the absolute right to access to their inholdings."*
	Young asks if there are any catchwords in the subject amendment which a sharp lawyer could use to preclude use.
	Seiberling responds: "Mr. Chairman, what it does say is that the fact that it is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, Native, or private land or make it subject to any of the laws or regulations that pertain to U.S. public lands, so that *those inholders are clearly not controlled by any of the public land laws of the United States.*
125 Cong. Rec. H 3249 (1979)	Rep. Seiberling states that H.R. 39 *guarantees access to every existing mining claim in any conservation unit to be created in Alaska by the bill.*
125 Cong. Rec. H 4231	Rep. Seiberling reads and explains clause 103(c) to show that inholders' access rights will be protected.
	[Emphasis added where underscored above.]

The Government contended that Section 103(c) does not apply but Section 1110(b) does, to allow the secretary to decide what is "adequate and feasible access" and, in Vogler's case, it is no access except in winter (Government's Ninth Cir. Br. 27). The Circuit Court adopted this view, holding Vogler's access was conditioned on applying for a winter only permit. It did not address

whether the denial of an access permit in winter, was a valid exercise of it.

The lower courts did not address the conflict between their finding this power to deny access by regulation from the general Park Service Organic Act and the clear congressional intent not to grant this power. The quoted debates make clear that the enacting Congress believed inholder access rights could not have been restricted by pre-ANILCA law, including 16 U.S.C. sections 1-3.

The lower courts concluded that 16 U.S.C. sections 1-3, the National Park Service Organic Act, gave sufficient general regulatory power to authorize the access permit system with the conditions (winter only) imposed on Vogler. But, that act provided that it was general and wherever a more specific Park Service statute applies, the general yields 16 U.S.C. Section 1c(b) provides:

> Section 1c. General administration provisions; system defined; particular areas
>
> (a) . . . .
>
> (b) [heading]
>
> Each area within the national park system shall be administered in accordance with the provisions of any statute made specifically applicable to that area. . . .

The legislative history of this provision is explicit stating:

> To the extent that the authorizing legislation for a specific area is inconsistent with the general administrative statutes made applicable to all units of the system, the language of the specific authorization is controlling, but otherwise the basic guidance afforded by the statutes enumerated above would be uniformly applicable. [Rep. 91-1265 of House Int. and Insul. Affairs Com. to H.R. 14114 to Pub. L. 91-383 (16 U.S.C. sec. 1c(b)); 2 U.S. Cong & Adm. News '70 @ 3787]

Since ANILCA has more specific application to access of ANILCA park inholders, it should have controlled over the general authority granted the secretary by the National Park Organic Act to promulgate regulations. ANILCA proponent Rep. Seiberling shared this view when he said, supra at 14, "those inholders are clearly not controlled by any of the public land laws of the United States."

Last Term the Court decided three taking by regulation cases. One was *Keystone Bituminous Coal Ass'n v. De Benedictis*, —— U.S. ——, 94 L. Ed.2d 472, 107 S. Ct. 1232 (1987), which held that a land use regulation is a regulatory taking if (i) it is not merely difficult, but impossible to make a profit on the land as restricted and (2) the regulation does not serve a legitimate, general and substantial public interest in the health, environment and fiscal integrity of the area. So the inquiry should be, first, whether the Government's power exists at all and, second, whether the interest being protected is a substantial police power type interest. The Government's interest in protecting park or preserve values from damage caused by legal but inconsistent use (an inholder's use of a public easement trail) is not the kind of police power type protection which justifies taking this otherwise legal access right, but that is what the inholder access regulation does. 43 CFR 36.10(e)(1) provides that significant adverse impacts on the natural values of the area, (e)(1)(i), or an inconsistency with the management plan for the area, (e)(1)(iii), are reasons for denial of the requested access, as well as a risk to public health or safety, (e)(ii). Only the latter is a police power type restriction. The others are value judgments which lack authority in a federal power.

Making parks and preserves out of unappropriated, surplus federal lands is not done to protect people or property from injury or damage. Congress' change of attitude away from mining and multiple use toward

preservation of the natural conditions of these lands, is a policy judgment which Congress may make only in exercise of an enumerated power with payment of just compensation.

III. WHEN ALASKA ATTAINED STATEHOOD, THE STATE DEPARTMENT ADVISED THE UNITED NATIONS THAT THE UNITED STATES WOULD CEASE REPORTING ON THE COLONIAL STATUS OF ALASKA BECAUSE IT HAD ATTAINED, WITH STATEHOOD, FULL SELF-GOVERNMENT, WHICH INCLUDED PRIMARY LAND AND RESOURCE OWNERSHIP

Article 73 of the United Nations Charter, 59 Stat. 1031 *et seq.* requires member nations with colonies or territories to hold those colonies under a "sacred trust" obligation to promote to the utmost, the well-being of the inhabitants of those territories. Art. 73(a) lists cultural, political, social, educational and economic advancement as one of the objectives in carrying out the sacred trust.

United Nation General Assembly Resolutions implementing this progression to self-government process show their belief that colonialism, especially land resource control, has been a frequent cause of war. Article 73 provides a process whereby the power to govern may be transferred to the colony, with land and natural resource control being transferred as soon as the colony has the ability to manage and develop them, the Resolutions unequivocally hold land and resource control to be an essential element of sovereignty. G.A. Resolution 1314, 12 December 1958, provides that self-determination includes "permanent sovereignty over their natural wealth and resources."

A U.N. Publication, *The Right To Self-Determination*, Historical and Current Development on the Basis of United Nations Instruments (1981) (U.N. Pub. No. E. 80 XIV 3) collects U.N. resolutions and documents on the meaning of sovereignty and concludes that it is a basic

right of peoples and it must include control over land and natural resources or it is hollow. Id. at paragraphs 214, 215, 216, 432-435, ending with:

> 438. Accordingly, the principle of the permanent sovereignty of States over their natural resources and their inalienable right to exercise this sovereignty have been recognized by all Member States of the United Nations and have been proclaimed and reaffirmed in a succession of General Assembly resolutions, the first of which (resolution 523 (VI)) dates back to 12 January 1952.

Vogler argued unsuccessfully below that the legislation by which Alaska became a state, executed the Art. 73 provisions of the U.N. Treaty giving citizens of Alaska enforceable rights under the Treaty. Vogler believes this holding was incorrect and seeks its reversal, but, aside from standing, the concept of sovereignty in international law includes similar principles to those at the basis of our Constitutional system of federalism and the Equal Footing Doctrine.

CONCLUSION

The political philosophy behind our Constitution's separation of powers, its apportionment of property control under Art. I and Art. IV of our Constitution, the Equal Footing Doctrine and the U.N. goal of monitoring the maturing colonial status as they progress toward the goal of sovereignty—all share the essential elements of transfer of land and resource control to the states at statehood.

There is no Constitutional ground or reason for the Federal Government needing to retain ownership of 30 to 80+% of the land in twelve of the Western states. *Kleppe v. New Mexico* aside, there is no federal Constitutional power or function that would be frustrated if these twelve states were allowed to join the others in controlling the lands within their boundaries. By definition,

the separation of powers provided for assures that, wherever necessary and proper, the federal government can purchase whatever land or easement it needs to carry out its enumerated powers.

Vogler respectfully requests this Court to grant the writ.

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